Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1215

UNITED STATES OF AMERICA,

Respondent,

vs.

ROBERT JACOBS,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now comes Robert Jacobs, by his attorney, and prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the final order of that Court in the above entitled cause, and in support states as follows:

REPORT OF OPINION.

The June 23, 1975 opinion of the District Court dismissing the indictment is appended hereto as Appendix ("App.") A, and the October 12, 1976 opinion of the Court of Appeals (with a dissenting opinion by the late Judge S. Hastings) reversing the District Court is attached hereto as App. B and is reported in 543 F. 2d 18 (7th Cir. 1976).

JURISDICTION.

This petition is filed pursuant to Rule 21 *et seq.* of the Rules of the Supreme Court of the United States.

(i) The judgment sought to be reviewed was entered on October 12, 1976 (App. B);

(ii) The order denying the petition for rehearing *in banc* was entered on a vote of a majority of the active members of the Seventh Circuit on February 2, 1977 (App. C);

(iii) Jurisdiction for review herein is conferred by 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether a demand for union recognition is rendered an illegitimate labor activity because the union lacks authority to represent the employees.

II.

Does the charge "seeking to become the exclusive bargaining representative" "encompass" illegitimate labor objections as defined in *United States* v. *Enmons*.

III.

Whether the materiality of the alleged false declaration appears on the face of an indictment for perjury where the indictment charges that it was material to a Hobbs Act investigation to determine whether a union organizer carried a gun while seeking exclusive union recognition.

IV.

Was Congressional policy violated by the federal perjury prosecution of a union organizer who allegedly falsely denied using force to organize on behalf of the union.

STATUTES INVOLVED.

The pertinent portions of the following statutory provisions involved herein are set forth in Appendix E.

18 U. S. C. § 1951.
29 U. S. C. § 158(b)(1) and (4)(i)(C).
18 U. S. C. § 1623.

STATEMENT OF CASE.

The indictment originated from a charge by the Gasoline Retailers Association of Metropolitan Chicago against Local 705, alleging violation of the National Labor Relations Act (Supplemental Record "Supp. R." 11). At a lengthy hearing before the National Labor Relations Board two service station operators testified concerning strong-arm tactics used by Local 705 to impose a three-year collective bargaining contract.

At the National Labor Relations Board hearing, Rex Jones, a service station operator, testified that Robert Jacobs, a union organizer for Local 705, entered his station in 1967 and said "he was there to have [Jones'] service station become a union station" (Record "R." 12, Exhibit "Ex." B, p. 191). Jones testified that Jacobs told him that "everybody on the street was in the union and [Jones] was going to join whether he liked it or not" (R. 13, Ex. B, p. 191). Jones stated that Jacobs then opened his jacket revealing a revolver on his hip. Jones acceded to Jacobs' request that Jacobs be permitted to speak with Jones' employees about joining Local 705. After the meeting the employees told Jacobs they refused to join the union. Jacobs then told Jones that unless Jones joined Local 705, his station would be picketed (R. 13, Ex. B, pp. 193, 198-9). Jones agreed that his son, a station employee, would join and Jones paid quarterly dues to union representatives and obtained a receipt for each payment (R. 13, Ex. B, pp. 196-198).

Robert Marshall, another service station operator, testified at the National Labor Relations Board hearing that in 1964 Jacobs entered his station, "laid two contracts on the table", opened his coat, displaying two guns,, and said "What's it going to be?" (R. 13, Ex. A. pp. 2744-5). Marshall then signed the union contracts and subsequently the quarterly dues were paid by check (R. 13, Ex. A, pp. 2745 and 2750).

The Administrative Law Judge found that Local 705 had employed "strong-arm demands" to impose a pre-printed three-year contract upon gasoline dealers in which Local 705 is recognized as the exclusive collective bargaining representative. He also found that the contracts were obtained by Local 705 through threats of cutting off gasoline deliveries at the service stations (Supp. R. 11). He concluded that "In a word, [Local 705's] activities here constituted sheer racketeering" and his June 23, 1972 report referred that matter to the United States Department of Justice for investigation (Supp. R. 11). The matter was received by the United States Attorney's Office in July of 1973 and presented to the September, 1973 Grand Jury (Supp. R. 11).

Jacobs voluntarily appeared before the September, 1973 Federal Grand Jury and denied carrying a gun into either Jones' or Marshall's service stations (Supp. R. 11). The May, 1975 Federal Grand Jury returned an indictment charging Jacobs with perjury before the September, 1973 Grand Jury.[1] The May, 1975 Grand Jury indictment which is attached as Appendix D charges that Jacobs was employed as an agent of Local 705 and his responsibilities included "organizing and obtaining recognition of Local 705 as a bargaining representative by gasoline and service station dealers" (App. D, p. 2). It charges Jacobs with committing perjury before the September, 1973 Grand Jury in (1) denying that he displayed a revolver when he entered the service station of Rex Jones and stated "Everybody on the street is in the union and you are going to be whether you like it or not" (App. D, p. 2), and (2) denying he entered Robert Marshall's service station "placed two Union contracts on the table, opened up [his] coat, displayed two guns" and said, "What's it going to be" (App. D, p. 3).

1. The September, 1973 Grand Jury returned an indictment charging Jacobs with perjury. No Hobbs Act charges were returned by the Grand Jury (R. 16, p. 5). The perjury charge was returned after the term of the September, 1973 Grand Jury had expired and upon dismissal of that indictment, the May, 1975 Grand Jury returned a superseding indictment charging Jacobs with perjury (18 U. S. C. § 1623) before the September, 1973 Grand Jury.

The indictment charges that Jacobs' declarations were false in that he entered the service stations in possession of a gun (App. D, p. 4). It alleges that Jacobs' threats were material to the September, 1973 Grand Jury investigation which was conducting a Hobbs Act investigation (18 U. S. C., Section 1951) because:

> "It was a material matter to said investigation that the grand jury should know and be informed of the methods by which representatives and agents of the Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, sought to obtain recognition by gasoline and service station dealers of Local 705 at the exclusive bargaining representative of their employees." (App. D, p. 1, par. 3.)

The indictment also charges that:

> "From in or about the Spring of 1963 through October 1968, Robert Jacobs was employed as an agent of Local 705 whose duties and responsibilities included, among others, organizing gasoline and service station employees and obtaining recognition of Local 705 as a bargaining representative by gasoline and service station dealers." (App. D, p. 2, par. 4.)

The defendant moved to dismiss the indictment on the grounds that it was not material to the investigation of the September, 1973 Grand Jury whether or not Jacobs brandished a gun while attempting to obtain recognition for Local 705. Citing *United States* v. *Enmons*, 410 U. S. 396 (1973), the defendant argued that use of force by union officials to achieve a legitimate labor end is not a violation of the Hobbs Act. The defendant argued that seeking to become an exclusive bargaining representative is a legitimate union end and, therefore, it was immaterial to a Hobbs Act investigation whether a union agent carried a gun while organizing. The District Court dismissed the indictment holding:

> ". . . the indictment alleges as being material only the methods used for obtaining exclusive recognition. This is not the type of improper purpose which the Supreme Court enunciated in *Enmons*. It appears from the indictment that the purpose for which the alleged force was being directed, i.e., to become an exclusive, legitimate representative, was not improper since no lawful indictment for Hobbs Act violations could have issued." (App. A, pp. 2-3.)

The government appealed and the Seventh Circuit reversed. The majority of the Court stated that the issue in the case is "whether the indictment shows on its face that the inquiry being conducted was unauthorized" (App. B, p. 3). The Court concluded that seeking recognition "is broad enough to encompass conduct outside the pursuit of legitimate labor ends" (App. B, p. 5). The Court reasoned:

> "Presumably a demand for recognition on behalf of a union authorized to represent the majority of employees albeit at gunpoint, cannot, under *Enmons* violate the Hobbs Act. We think the same demand on behalf of a union which does not have authority to represent any of them could violate it. Extortion of personal payoffs or other illegitimate benefits would not be protected by *Enmons*". (App. B, p. 5.)

The late Senior Judge Hastings dissented stating that seeking to become an exclusive bargaining agent is a legitimate labor objective and the majority holding that it encompasses illegitimate activities improperly extends *Enmons* and significantly changes the sensitive federal-state balance. Judge Hastings stated:

> "The key issue, of course, is in the interpretation of *United States* v. *Enmons*, 410 U. S. 396 (1973), in which a divided Court held that the Hobbs Act, 18 U.S.C., § 1951, which makes it a federal crime to obstruct interstate commerce by robbery or extortion, does not reach the use of violence (which is readily punishable under state law) to achieve legitimate union objectives, such as higher wages in return for genuine services that the employer seeks. *Id.* 399-411.
>
> Judge McLaren [the District Judge] reasoned that the *methods* employed by Local 705 Union were immaterial

to a Hobbs Act violation, if the end was legitimate. He further found that the end sought by the union, to become the exclusive bargaining representative of the employees of the subject filling station, was legitimate. From this he concluded that the testimony of Jacobs, the labor union's authorized organizer, concerning the *means* employed to accomplish that end could not have been material to a Hobbs Act violation. The court filed a memorandum opinion and order on the same date.

If the reach of *Enmons* is to be further extended, as urged by the majority, I would leave that to the United States Supreme Court in an appropriate case. Indeed, in *Enmons*, quoting from *United States* v. *Bass*, 404 U. S. 336, 349 (1971), the Court said: [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. 410 U. S. at 411-412." (App. B, pp. 6-7.)

The petition for rehearing *in banc* was denied by a vote of the majority of the active members of the Seventh Circuit.

I.

THE HOLDING THAT SEEKING TO BECOME THE EXCLUSIVE BARGAINING REPRESENTATIVE ENCOMPASSES AN ILLEGITIMATE LABOR OBJECTIVE VIOLATES UNITED STATES v. ENMONS.

A. The Holding in Enmons.

The Hobbs Act (18 U. S. C., § 1951(b)(2)) defines extortion as:

> ". . . the obtaining of property from another, with his consent induced by wrongful use of actual or threatened force, violence or fear . . ."

In *United States* v. *Enmons*, 410 U. S. 396 (1973) union members fired high-powered rifles and dynamited a transformer substation to pressure the company to agree to collective bargaining. The district court dismissed the indictment for failing to state an offense on the ground that the Hobbs Act does not proscribe union violence to obtain legitimate union objectives (p. 398). The government appealed contending that wages are property of the employer and the use of force to obtain wages is extortion as defined by the Hobbs Act. This Court determined that the term "wrongful" did not modify "force, violence or fear" since any violence or force to obtain property is "wrongful". It reasoned that "wrongful" limits the coverage of the Act and obtaining property by violence is "wrongful" only where the "extortionist has no lawful claim" to the property sought (p. 400). The Court held that the Hobbs Act "does not apply to the use of force to achieve *legitimate labor ends*" (p. 401) (emphasis added). Concluding that seeking a collective bargaining agreement is a legitimate labor end, the Court affirmed the district court's dismissal of the indictment.

In *Enmons* this Court carefully reviewed the legislative history of the Hobbs Act and analyzed the Anti Racketeering Act of 1934, the predecessor to the Hobbs Act. It quoted extensively from the Congressional record where Congress clearly expressed its intent that the Hobbs Act would not proscribe union violence which occurred in connection with legitimate labor activity. It ruled that the Hobbs Act reaches extortion where the violence is directed to the "illegitimate" labor objectives of obtaining a personal payoff or imposing fictitious or unwanted services.

The Court found that Congress did not intend the federal government to usurp state criminal jurisdiction over violence occurring during labor disputes. It stated that were the Hobbs Act to cover such violence, employees who threw a punch on the picket line or deflated the employer's tires would be subject to a possible penalty under the Hobbs Act of 20 years imprisonment and a $10,000 fine.

The Court in *Enmons* approved the Ninth Circuit opinion in *United States* v. *Caldes*, 457 F. 2d 74 (9th Cir., 1972), where two Union officials were convicted of violating the Hobbs Act when they damaged company property in an attempt to pressure the company into a collective bargaining agreement. In *Caldes*, the dismissal of the indictment was upheld because the Court ruled that collective bargaining was a legitimate labor end. The Court in *Caldes* stated that to hold otherwise "would make cirminal the [violent] activities of many militant labor organizations" (p. 78) which is condemned by the Taft-Hartley Act as an unfair labor practice and is a violation of state criminal law.

B. A Demand for Union Recognition Is Not Rendered an Illegitimate Labor Activity Because the Union Lacks Authority to Represent the Employees.

The majority opinion in Jacobs holds that seeking recognition encompasses conduct outside the pursuit of legitimate labor ends *if the extortionate demand is made by a Union which does not have the authority to represent a majority of the employees.* The Court stated:

> ". . . the alleged purpose of the investigation, i.e., into methods of seeking recognition, is broad enough to encompass conduct outside the pursuit of legitimate labor ends. *Presumably* a *demand for recognition, on behalf of a union authorized to represent the majority of employees albeit at gunpoint, cannot, under Enmons violate the Hobbs Act. We think the same demand on behalf of a union which does not have authority to represent any of them could violate it.*" (App. B, p. 5.) (emphasis added.)

The ruling that Hobbs Act reaches violent union activities of collective bargaining, organizing and strikes if the union lacks authority to represent a majority of employees sweeps away the holding in *Enmons*. Labor violence is a common occurrence in the United States for labor disputes evoke deep emotional responses. Congress has declared that the violent by-product of

the frustration and emotionalism engendered by labor disputes is subject to state, not federal criminal jurisdiction. The majority in *Jacobs* departs from Congressional policy by conferring nearly unlimited authority upon federal prosecutors over violence or threats occurring during a labor activity.

The purpose of union organizing is to obtain union membership of a majority of the employees so that the union will become the exclusive bargaining representative. Until organizing efforts are accomplished, the union does not represent a majority of the employees. Therefore, under *Jacobs all* violence occurring during the process of organizing violates the Hobbs Act. Similarly, the union may not be authorized to represent a majority of the employees during a strike or collective bargaining. In such cases, Hobbs Act jurisdiction is invoked by the decision in *Jacobs*. The decision puts the "Federal Government in the business of policing the orderly conduct of strikes" in contradiction of the holding of *Enmons* (*Enmons*, p. 411).

If the opinion below stands and extortionate demands are elevated to Hobbs Act violations where the union lacks authority to represent the employees, the federal courts will have to determine in each case whether the union represented the majority. Among the questions the Court or jury will be required to determine will be (i) the total number of employees, (ii) the number of valid union authorization cards, (iii) whether any cards were revoked or obtained by fraud, duress or misrepresentation, (iv) whether an employee is working part-time and is to be counted in determining a majority, and (v) which employees are to be considered part of the bargaining unit—*i.e.*, should clerical employees, messengers or certain supervisors be considered as an employee subject to union jurisdiction.

These difficult questions involving union authority to represent employees should remain with the National Labor Relations Board which has developed an expertise in these matters after hearing thousands of such cases.[2] They do not belong in a federal

2. In *Jacobs*, the N. L. R. B. heard testimony of whether Local 705 represented a majority of Jones' and Marshall's employees. At

(Continued on next page)

criminal proceeding. Yet, by transforming a legitimate labor activity into an illegitimate activity where the union lacks authority to represent the employees, the Court below has drastically expanded the scope of federal criminal jurisdiction over labor disputes by erroneously defining an illegitimate labor activity.

> "Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into criminal jurisdiction of the States." (*Enmons*, p. 411.)

As stated by Judge Hastings in his dissenting opinion in *Jacobs:*

> "If the reach of *Enmons* is to be further extended, as urged by the majority, I would leave that to the United States Supreme Court in an appropriate case." (App. B, p. 6).

C. Seeking "to Obtain Recognition as the Exclusive Bargaining Representative" Does Not Encompass Illegitimate Labor Ends.

In *Enmons*, the Court held that the Hobbs Act reaches the obtaining of property by "wrongful" force, which is defined as force used where the extortionist "has no lawful claim to that property" (p. 400). The Court stated that "wrongful" taking proscribed by the Hobbs Act reaches instances:

> ". . . where union officials threatened force or violence against an employer in order to obtain personal payoffs, and where unions use the proscribed means to exact 'wage' payments from employers in return for 'imposed, unwanted, superfluous and fictitious services' of workers." (p. 400.)

(Continued from preceding page)

Jones' station of the three full-time and two part-time employees who worked for Jones, one employee joined Local 705 (R. Ex. B, pp. 196-9). Of two full-time and one part-time employees who worked for Marshall, Marshall and one employee joined Local 705 (R. 13, Ex. A, p. 2745).

In *Jacobs*, the majority ruled that the term seeking to become the *"exclusive bargaining representative"* is broad enough to include wrongful conduct by union officials as defined in *Enmons* for it "encompass[es]" (i) seeking recognition where the union lacks authority to represent a majority of the employees; and (ii) "extortion of personal payoffs or other illegitimate benefits" (App. B, p. 5).

The issue presented is whether the charge that the union function of seeking "to obtain recognition as the exclusive bargaining representative" encompasses illegitimate labor ends. In part I(B) of this Petition, we have established that the failure to represent a majority of the employees does not render the union objective illegitimate. We will discuss in this section whether seeking to become the exclusive bargaining representative encompasses the activities of extortion of personal payments and other illegitimate benefits.

The very words of the charge clearly establish that seeking to become an exclusive bargaining representative does not include an illegitimate labor end. Seeking *"recognition* [by filling station dealers] *as the exclusive bargaining representative of* [*their*] *employees*" (App. D, p. 1, par. 3) refers explicitly and solely to legitimate labor ends. Becoming the exclusive bargaining representative of employees is in no way connected with and has nothing whatever to do with illegitimate activities of demanding payoffs or imposing fictitious or unwanted services.[3] Union activity to become the exclusive bargaining agent is not a

3. The indictment and record in this case affirmatively establish that neither personal payoffs or extortion of wages for fictitious services were involved. The National Labor Relations Board testimony reflects that Jones and Marshall joined Local 705 and paid quarterly dues. Jones obtained a receipt for cash payment and Marshall paid by check (R. 13, Ex. A, pp. 2744, 2750; and Ex. B, pp. 196-198). There are no alleged superfluous services for the indictment alleges the grand jury was investigating methods of organizing employees of service station dealers (App. D, p. 1). Imposing fictitious or unwanted services is not accomplished by organizing *existing* employees. *United States* v. *Local 807*, 315 U. S. 521 (1942); *United States* v. *Kemble*, 198 F. 2d 889 (3rd Cir., 1952).

" 'wrongful' taking of an employer's property" nor an "unlawful" claim to the employer's property as defined in *Enmons;* rather, it is a legitimate labor function whereby the union seeks authority to enter into collective bargaining on behalf of employees.

A union official who is attempting to extort personal payoffs or salaries for fictitious or unwanted employees is not organizing for the union. Such conduct is antithetical to obtaining union recognition. The District Court correctly held that seeking to become the service station employees' exclusive representative is a "legitimate object" (App. A, p. 3) and not a violation of *Enmons*. The Court held:

> "This is not the type of improper purpose which the Supreme Court enunciated in *Enmons*. It appears from the indictment that the purpose for which the alleged force was being directed, i.e., to become an exclusive, legitimate representative, was not improper since no lawful indictment for Hobbs Act violations could have issued." (App. A, pp. 2-3.)

Senior Judge John Hastings agreed with the District Court that the means employed by Jacobs to accomplish the end of becoming exclusive bargaining representative could not have been material to a Hobbs Act violation because:

> ". . . the end sought by the union, to become the exclusive bargaining representative of the employees of the subject filling station, was legitimate." (App. B, p. 6.)

There is no basis for the majority in *Jacobs* to have found that the legitimate labor end of seeking recognition "is broad enough to encompass" illegitimate ends (App. B, p. 5). An explanation for the ruling may have been based on the majority's misplaced reliance on *United States* v. *Quinn*, 514 F. 2d 1250 (5th Cir., 1975). In *Quinn*, a union official was convicted of violating the Hobbs Act when he accepted personal payoffs in return for calling off a *bona fide* strike. Reasoning that since illegitimate ends, such as seeking payoffs, could occur in connection with a *bona fide* strike in *Quinn*, the majority in *Jacobs* apparently concluded that the illegitimate ends could also occur

in connection with seeking to become the exclusive bargaining representative.

But it does not follow that because an illegitimate end can occur while labor is seeking a legitimate objective, that the illegitimate end *is encompassed* within the legitimate labor end. Webster defines "encompass" to mean "to contain", "to encircle", and "to develop". The synonym is "to embrace". Legitimate objectives, such as organizing collective bargaining and conducting strikes *do not contain, envelop or embrace* illegitimate objectives. Even when they may occur concurrently, the legitimate labor ends are entirely separate and distinct from extorting payoffs.

In attributing illicit motives to union officials engaged in organizing, the majority in *Jacobs* has erroneously assumed that the legitimate goals of organized labor in the United States "encompass" corrupt objectives. This jaded impression of union objectives was obviously influenced by the Court's repulsion at the charge that Jacobs brandished revolvers when organizing for Local 705. However, in determining whether the labor objective being investigated by the grand jury is legitimate, the Court must not consider the force used to accomplish that objective. The means used, no matter how violent, do not render the objective illegitimate. In *Enmons,* this Court separated the violence of firing high-powered rifles and dynamiting sub-stations from its consideration of whether the labor objective was legitimate. *Enmons* teaches that if the labor ends are legitimate the Hobbs Act is not violated and violence employed to obtain that objective is irrelevant. Any violence used to achieve a labor end, therefore, *only* becomes relevant *after* it is first determined that the labor objective under investigation by the grand jury is illegitimate.

The distinction of whether legitimate labor objectives encompass or contain illegitimate ends is not merely semantical—it is fundamental to the holding in *Enmons*. The majority in *Jacobs* circumvents *Enmons* for it sanctions prosecution of union

officials who falsely deny conduct directed at achieving legitimate labor ends when *Enmons* holds such conduct is not cognizable within federal criminal jurisdiction. The decision sustains the validity of an indictment charging a union official with falsely denying conduct in furtherance of a legitimate labor end when under *Enmons,* coercing filling station employees to join Local 705 is not prosecutable under federal criminal law.

II.

THE MATERIALITY OF THE ALLEGED FALSE DECLARATION DOES NOT APPEAR ON THE FACE OF THE INDICTMENT.

An indictment alleging perjury must reflect on its face that the alleged false declarations were material to the grand jury investigation.

> " 'It is undoubtedly necessary that it should appear on the face of the indictment that the false declarations were material to the matter in issue.' " *Markham* v. *United States,* 160 U. S. 319, 325 (1895).[4]

Here, not only does it not affirmatively appear on the face of the indictment that Jacobs' declarations were material to a Hobbs Act violation—the indictment affirmatively reflects on its face the declarations were not material to a Hobbs Act violation. Whether Jacobs used coercion by brandishing a revolver to obtain recognition of Local 705 is irrelevant to a Hobbs Act offense. To put it another way, had Jacobs admitted carrying the gun while organizing for Local 705, the testimony would have been irrelevant to the grant jury inquiry for under *Enmons* coercion to achieve the legitimate objective of exclusive recognition is not a federal criminal violation.

4. The Circuit decisions following *Markham* have consistently held that the indictment must reflect on its face that the false statements were material to the investigation. *Williams* v. *United States,* 239 F. 2d 748 (5th Cir., 1957); *Woolley* v. *United States,* 97 F. 2d 258 (9th Cir., 1938); *Clayton* v. *United States,* 284 Fed. 537 (4th Cir., 1922); *Morris* v. *United States,* 261 Fed. 175 (7th Cir., 1919).

The interpretation by the Court below that the face of the indictment reflects Jacobs' declarations were material to a Hobbs Act investigation constitutes an unauthorized expansion of the charge.

> "[I]t should not be left in doubt, or to mere inference, from the words of the indictment, whether the offense charged was one within Federal cognizance." *Blitz* v. *United States,* 153 U. S. 308, 315 (1894).

As stated in *Russell* v. *United States,* 369 U. S. 749 (1962):

> "A grand jury, in order to make that ultimate determination [of the scope of the inquiry], must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." (p. 770.)

Enmons held that in interpreting a criminal statute, the language must be strictly construed and any ambiguity must be resolved in favor of leniency (*Enmons, supra,* p. 411). Similarly, the language of an indictment must be strictly construed and any ambiguity must be resolved in favor of leniency. Since it affirmatively appears in the indictment that Jacobs was engaged in a legitimate labor activity, the indictment must be dismissed.

III.

PROSECUTION FOR PERJURY ARISING OUT OF AN INVESTIGATION INTO UNION ORGANIZING ACTIVITIES VIOLATES CONGRESSIONAL POLICY.

This Court concluded in *Enmons* that the Hobbs Act was not intended to expand the delicate balance of federal criminal jurisdiction over union violence which has existed over three decades. As Mr. Justice Stewart stated:

> "Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States." (p. 411.)

The policy of federal criminal jurisdiction over union violence has been carefully considered many times by Congress. Senator Kennedy succinctly expressed Congressional policy stating:

> "The crimes of violence, arson, assault and so forth with which we are all familiar, are essentially problems of enforcement of criminal laws at the local level. Correction of this kind of activity is and should remain a function of police authorities at the local and State level. I do not believe, and I think this opinion is shared by my colleagues in the Senate, that the Federal Government should get into the business of exercising the police power which has traditionally and properly been the function of local authority." (2 Legislative History at 1023-24, S. 1555; complete text is cited on page 24 of *Amicus Curiae* brief filed in the Seventh Circuit.)

Congress specifically provided in subsection (c) of the Hobbs Act that the Act shall not modify or affect various statutes involving the regulation of labor-management disputes, including those defining unfair labor practices. Subsection (c) provides:

> "This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45." (18 U. S. C. § 1951(c).)

The ruling in *Jacobs* violates subsection (c) for it converts an unfair labor practice into a Hobbs Act violation for (i) a union demand for recognition when it does not represent a majority of the employees is an unfair labor practice. ***International Ladies Garments' Workers Union*** v. ***National Labor Relations Board***, 366 U. S. 731 (1961); and (ii) union force to obtain recognition as the exclusive bargaining agent is an unfair labor practice (29 U. S. C., § 158(b)(i) and (4)(ii)(C)).

The holding in *Jacobs* subjects every legitimate union activity to grand jury investigation where violence erupts. If the union lacked authority to represent the employees and violence occurs during collective bargaining or union organization a Hobbs Act indictment may issue. Further, by classifying a legitimate labor end as "encompass[ing]" illegitimate objectives, all declarations made to a grand jury investigating a legitimate activity are subject to prosecution for perjury. The majority has thereby converted the exclusive state offense of assault, etc. arising out of a labor dispute into a federal Hobbs Act or a potential perjury offense. The decision upsets legislation of labor activities which Justice Frankfurter referred to as the "result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation. . ." ***Local 1976, United Brotherhood of Carpenters*** v. ***N. L. R. B.***, 357 U. S. 93, 99-100 (1958).

This is the first reported case where the Department of Justice has succeeded in its attempt to abridge Congressional intent by prosecuting union acts of violence occurring incident to attempting to become recognized as the exclusive bargaining representative. But it is not the first time the Department has attempted to abridge Congressional policy. In ***United States*** v. ***DeLaurentis***, 491 F. 2d 208 (2nd Cir., 1974), and in ***United States*** v. ***Bailes***, 120 F. Supp. 614 (S. D. W. Va. 1954), the government charged union officials with violating the Civil Rights Act by using violence to become the exclusive bargaining representative. In ***DeLaurentis*** the court dismissed the indictment stating:

> "[T]he government has unjustifiably used federal law to convert an unfair labor practice into a criminal conspiracy." (page 214.)

In ***Bailes***, the court dismissed the indictment stating "what the government is trying to do is prosecute an unfair labor practice as a federal criminal conspiracy" (p. 637). The Court added:

> "The enforcement of the general criminal laws is a local matter with responsibility resting squarely upon the city, county and state officials. Federal courts have no jurisdiction over ordinary acts of violence, because such acts are offenses only against the State and are not offenses against the Federal Government, which can be prosecuted in the Federal Courts. That is as it should be." (p. 637.)

Since the government has been prevented from employing the Hobbs Act or the Civil Rights Act against union organizers who use violence when seeking to become bargaining representative, it has now sought to prosecute that conduct by utilizing the federal perjury statute. Unfortunately, the holding in *Jacobs* enables the government to finally succeed in violating Congressional policy by invading the exclusive criminal jurisdiction of the states.

Judge Hastings correctly reasoned in his dissenting opinion that "[i]f the reach of *Enmons* is to be further extended, as urged by the majority, I would leave that to the United States Supreme Court in an appropriate case." (App. B, p. 6.) Judge Hastings urged sustaining the dismissal of the indictment by quoting the concluding comments of the Court in *Enmons* which in turn quoted its decision in *United States* v. *Bass*, 404 U. S. 336, 349 (1971):

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." (pp. 411-412.)

The philosophical convictions of the majority concerning State criminal jurisdiction over activities of organized labor in the United States should not control: it is for Congress to mandate an expansion of *Enmons* and broaden the Government's criminal jurisdiction over violence by labor representatives. Congress'

purpose is clear—violence used to become the exclusive bargaining representative is a State offense and not a violation of federal criminal law. Congress has carefully attempted to maintain this sensitive federal-state balance and the opinion below upsetting that balance must be corrected.

CONCLUSION.

Wherefore, since the decision below conflicts with the *Enmons* decision of this Court, involves important questions of federal law which should be settled by this Court and has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power, it is prayed that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

RICHARD G. SCHULTZ,
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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA *vs.* ROBERT JACOBS	}	No. 75 CR 331

MEMORANDUM OPINION AND ORDER

This matter[1] is before the Court on the pretrial motions of the defendant, Robert Jacobs ("Jacobs"). For the reasons set forth below, the indictment will be dismissed.

The indictment is in one count and charges that Jacobs committed perjury before the September 1973 Grand Jury, which was investigating Hobbs Act violations[2] in violation of 18 U. S. C. § 1623. It is alleged he made false statements concerning his use of threats while attempting to gain the recognition of his union, Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, by gasoline and service station dealers as the exclusive bargaining representative of their employees. Because of the Court's disposition of Jacob's motion to dismiss based upon the materiality of his testimony, it need not decide the other motions presented.

---

1. Defendant was originally indicted in case number 75 CR 180. Defendant filed various motions, one of which challenged the validity of the indictment on the basis of the expiration of the term of the September 1973 Grand Jury. The government dismissed the previous indictment and the May 1975 Grand Jury issued the indictment which is the subject matter of this case.

2. 18 U. S. C. § 1951.

Defendant contends that the questions asked were not material to the grand jury's investigation and therefore the indictment should be dismissed. 18 U. S. C. § 1623 provides that the statement made must be a "false *material* declaration." (Emphasis added.) Materiality is an essential element and is a question of law for the Court. *United States* v. *Devitt*, 499 F. 2d 135, 138 (7th Cir. 1974). The indictment alleges that the statements were material to a Hobbs Act, 18 U. S. C. § 1951, investigation in which the grand jury—

> "should know and should be informed of the methods by which representatives and agents of the Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, sought to obtain recognition by gasoline and service station dealers of Local 705 as the exclusive bargaining representative of their employees.
>
> "4. From in or about the Spring of 1963 through October 1968, Robert Jacobs was employed as an agent of Local 705 whose duties and responsibilities included, among others, organizing gasoline and service station employees and obtaining recognition of Local 705 as a bargaining representative by gasoline and service station dealers."

The defendant contends that it was not material to the grand jury's investigation whether or not Jacobs carried a gun while attempting to obtain recognition for his union. Defendant relies upon *United States* v. *Enmons*, 410 U. S. 411 (1973), in which the Supreme Court held that the Hobbs Act does not cover activities in which violence is used for legitimate union purposes. The Court did create an exception where violence is used for improper purposes, *e.g.*, to obtain funds for personal profit or to pay for fictitious services of the union employee. The government contends that the indictment alleges that the grand jury was investigating Hobbs Act violations. This is not a sufficient response since the indictment alleges as being material only the methods used for obtaining exclusive recognition. This is not the type of improper purpose which the Supreme Court enunciated in *Enmons*. It appears from the indictment that the purpose for which the alleged force was being directed, *i.e.*, to become an

exclusive, legitimate representative, was not improper since no lawful indictment for Hobbs Act violations could have issued. The government contends that the grand jury may have been investigating improper *methods* such as union payoffs, etc. However, the indictment alleges that the object of the methods used was for the union to become the station employees' exclusive representative, which is a legitimate object. An indictment's sufficiency must be determined by practical considerations and must first—

> "contain the elements of the offense intended to be charged, and it must be sufficient to apprise the accused of the nature of the offense. Second, after conviction, the record of the case must be sufficient so that the accused can plead the judgment in bar of any subsequent prosecution for the same offense. * * * Prejudice to a defendant is also a controlling factor." *United States* v. *Rook*, 424 F. 2d 403, 405 (7th Cir. 1970).

The government next contends that *Rook* stands for the proposition that a single allegation of materiality is sufficient rather than allegations of fact which, if true, show materiality. This is too broad a statement in light of both the facts and holding of *Rook*. In *Rook*, the indictment sets out the facts which were material to a prior proceeding and the substance of defendant's false testimony. *Id.* at 405. In the instant case, where the Supreme Court has stated that certain union activities are not Hobbs Act violations, while others are, the indictment must provide an allegation of materiality which, at least, states that some question as to the propriety of the union activities existed. This is especially true here, where *Enmons* has recently been decided and no substantive Hobbs Act indictments were returned. The indictment is therefore dismissed.

IT IS SO ORDERED.

Entered:

/s/ R. W. MCLAREN,
United States District Judge.

Dated: June 23, 1975

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1777
UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ROBERT JACOBS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 CR 311—Richard W. McLaren, *Judge*.

ARGUED JANUARY 8, 1976—DECIDED OCTOBER 12, 1976

Before FAIRCHILD, *Chief Justice*, HASTINGS, *Senior Circuit Judge*, and EAST, *Senior District Judge*.*

FAIRCHILD, Chief Justice. The Government appeals from an order of the district court dismissing a perjury indictment against defendant Robert Jacobs. We must decide whether *United States* v. *Enmons*, 410 U. S. 396 (1973), which held the Hobbs Act, 18 U. S. C. § 1951, inapplicable to use of force in achieving legitimate labor ends, also protects Jacobs, a union employee, from prosecution for perjury before a grand jury which was investigating possible Hobbs Act violations.

* Senior District Judge William G. East of the United States District Court for the District of Oregon is sitting by designation.

On May 15, 1975 the May 1975 Grand Jury returned a one-count indictment against Jacobs charging him with violation of 18 U. S. C. § 1623 (making false declarations before a grand jury). The indictment alleged that Jacobs had falsely declared that he had never carried or brandished a gun in the course of his union organizing activities. The indictment read, in part:

"The May 1975 GRAND JURY charges:

1. On September 19, 1973, at Chicago, in the Northern District of Illinois, Eastern Division, the September 1973 Grand Jury was sitting as a duly impaneled and sworn grand jury of the United States.

2. At the time and place aforesaid, the September 1973 Grand Jury was conducting an investigation and receiving testimony from witnesses pertaining to possible violations of Title 18, United States Code, Section 1951, and other federal criminal statutes.

3. It was a matter material to said investigation that the grand jury should know and should be informed of the methods by which representatives and agents of the Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, sought to obtain recognition by gasoline and service station dealers of Local 705 as the exclusive bargaining representative of their employees.

4. From in or about the Spring of 1963 through October 1968, Robert Jacobs was employed as an agent of Local 705 whose duties and responsibilities included, among others, organizing gasoline and service station employees and obtaining recognition of Local 705 as a bargaining representative by gasoline and service station dealers."

Succeeding paragraphs set out defendant's denials that he had carried or brandished a gun in the course of his activities and the falsity of those denials.

The district court on June 23, 1975 dismissed the indictment on the grounds that the indictment on its face showed that the grand jury was investigating conduct that was unindictable under *Enmons, supra,* and that to survive *Enmons* the indictment would have to allege some reason to question the legitimacy of the union activities being investigated.

On appeal, the parties failed to agree on the precise issue of the case. Counsel for Jacobs, conceding *arguendo* the false declarations, contends that the issue is one of materiality. He argues that Jacobs' false declarations before the September 1973 Grand Jury were in response to questions which were not material to the Grand Jury's investigation and therefore they were not proscribed by 18 U. S. C. § 1623. The Government, on the other hand, contends that the questions and false declarations were clearly material to the investigation, and frames the issue as whether the indictment shows on its face that the inquiry being conducted was unauthorized. False declarations made before a grand jury material only to an investigation beyond its jurisdiction or authority do not constitute perjury. *Brown* v. *United States,* 245 F. 2d 549, 552 (8th Cir. 1957).

We agree with the Government's analysis of the issue, remembering, of course, that we are presently testing the sufficiency of an indictment. The indictment alleges that Jacobs' false declarations were material, and it seems clear that whether Jacobs brandished a gun while calling on service stations in the process of organizing employees and seeking recognition seems clearly material to the alleged purpose of the investigation —the methods by which recognition was sought. The real question is whether the alleged purpose was wholly beyond the grand jury's authority. Can it be said, from the face of the pleading, either that the grand jury was looking only for conduct which, under *Enmons,* was not a federal offense, or that no conduct which might be found in an investigation so described could be indictable after *Enmons?*

In *Enmons,* employees of a utilities company were charged with conspiring to obstruct commerce during a strike: firing rifles at three company transformers, draining the oil from a transformer, and blowing up a transformer substation. The Supreme Court held that an indictment under the Hobbs Act

must be dismissed, because "the Act does not apply to the use of force to achieve legitimate labor ends." *Enmons, supra,* 410 U. S. at 401. Such acts of violence are left to state court prosecution.

In view of the fact that organizing and seeking recognition seem clearly legitimate union ends, appellant urges us, in effect, to find that his false declarations were material only to a grand jury investigation which could not have resulted in an indictment.

Enmons itself teaches, however, that some activity, even in a labor context, can violate the Hobbs Act:

> . . . [T]he Hobbs Act has properly been held to reach instances where union officials threatened force or violence against an employer in order to obtain personal payoffs, and where unions used the proscribed means to exact 'wage' payments from employers in return for 'imposed, unwantetd, superfluous and fictitious services' of workers. *Enmons, supra,* 410 U. S. at 400. (Footnotes omitted.)

In other words, violence joined with illegitimate objectives may result in a Hobbs Act violation.

A recent Fifth Circuit case illustrates the point. In *United States* v. *Quinn,* 514 F. 2d 1250 (5th Cir. 1975), a clergyman who was authorized to represent certain employees in a labor dispute was convicted of a Hobbs Act violation for receiving payments from an employer in return for calling off a picket line. The Fifth Circuit affirmed the conviction, even though conceding as to one count of the indictment that:

> 1. A bona fide labor dispute existed between American Discount and its employees;
>
> 2. The attainment of higher pay was, on the part of the employees, a legitimate labor objective;
>
> 3. The employees got the higher wages;
>
> 4. Reverend Quinn was authorized by the American Discount employees to represent them and to act as their spokesman.

* * * * * *

Quinn, supra, 514 F. 2d at 1259.

Further complicating the case as to the count of the indictment just mentioned was that the $300.00 received from the employer by the defendant was used entirely to defray expenses incurred in the picketing, $180.00 for premiums on bail bond and $120.00 for attorney fees. *Id.* at 1258.

Returning to the case before us, the alleged purpose of the investigation, *i.e.,* into methods of seeking recognition, is broad enough to encompass conduct outside the pursuit of legitimate labor ends. Presumably a demand for recognition, on behalf of a union authorized to represent the majority of employees albeit at gunpoint, cannot, under *Enmons* violate the Hobbs Act. We think the same demand on behalf of a union which does not have authority to represent any of them could violate it. Extortion of personal payoffs or other illegitimate benefits would not be protected by *Enmons.* We differ, again, from the district court, and deem it unnecessary that the instant perjury indictment must spell out some cause to question the propriety as labor objectives of the purposes being pursued by defendant. If the alleged purpose of the investigation is broad enough to cover both unindictable and indictable conduct, we see no policy reason for construing it to mean only the former. The mere possibility that the grand jury would not find conduct indictable in the light of *Enmons* would not deprive it of authority to investigate to see whether indictable offenses had been committed.

The judgment dismissing the indictment is reversed, and the cause is remanded for proceedings consistent with this opinion.

REVERSED.

HASTINGS, Senior Circuit Judge, dissenting.

In my judgment, the majority errs in framing the issue before us on this appeal, viz.: "whether the alleged purpose [of the grand jury investigation] was wholly beyond the grand jury's authority." Rather, I suggest that the district court[1] was correct in contending that the issue is one of *materiality*. This is to say, conceding that Jacobs made false declarations before the grand jury, that they were in response to questions which were not material to the grand jury's investigation and therefore were not proscribed by 18 U. S. C. § 1623.

The key issue, of course, is the interpretation of *United States* v. *Enmons*, 410 U. S. 396 (1973), in which a divided Court held that the Hobbs Act, 18 U. S. C. § 1951, which makes it a federal crime to obstruct interstate commerce by robbery or extortion, does not reach the use of violence (which is readily punishable under state law) to achieve legitimate union objectives, such as higher wages in return for genuine services that the employer seeks. *Id.* 399-411.

Judge McLaren reasoned that the *methods* employed by Local 705 Union were immaterial to a Hobbs Act violation, if the end was legitimate. He further found that the end sought by the union, to become the exclusive bargaining representative of the employees of the subject filling station, was legitimate. From this he concluded that the testimony of Jacobs, the labor union's authorized organizer, concerning the *means* employed to accomplish that end could not have been material to a Hobbs Act violation. The court filed a memorandum opinion and order on the same date.

If the reach of *Enmons* is to be further extended, as urged by the majority, I would leave that to the United States Supreme Court in an appropriate case. Indeed, in *Enmons*, quoting from *United States* v. *Bass*, 404 U. S. 336, 349 (1971), the Court

1. United States District Court for the Northern District of Illinois, Eastern Division, the late Honorable Richard W. McLaren, presiding.

said: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." 410 U. S. at 411-412.

Based upon the foregoing, together with the well-considered memorandum opinion of Judge McLaren, I would affirm the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
February 2, 1977

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. JOHN S. HASTINGS, SR., *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge**
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. WILLIAM G. EAST, SR., *District Judge***

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. ROBERT JACOBS, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 75 CR 331.

No. 75-1777

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, an answer thereto having been requested and filed, a vote of the

* Judge Swygert voted to grant the petition.

** Senior District Judge William G. East of the United States District Court for the District of Oregon is sitting by designation.

active members of the Court was requested, and a majority of the active members of the Court having voted to deny a rehearing *in banc*,

IT IS ORDERED that the petition for rehearing and the suggestion that it be heard *in banc* be, and the same are hereby, DENIED.

APPENDIX D.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA	}	No. 75 CR 331
vs.		
ROBERT JACOBS		

VIOLATION: TITLE 18, UNITED STATES CODE, SECTION 1623.

THE MAY 1975 GRAND JURY charges:

1. On September 19, 1973, at Chicago, in the Northern District of Illinois, Eastern Division, the September 1973 Grand Jury was sitting as a duly impaneled and sworn grand jury of the United States.

2. At the time and place aforesaid, the September 1973 Grand Jury was conducting an investigation and receiving testimony from witnesses pertaining to possible violations of Title 18, United States Code, Section 1951, and other federal criminal statutes.

3. It was a matter material to said investigation that the grand jury should know and should be informed of the methods by which representatives and agents of the Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, sought to obtain recognition by gasoline and service station dealers of Local 705 as the exclusive bargaining representative of their employees.

4. From in or about Spring of 1963 through October 1968, Robert Jacobs was employed as an agent of Local 705 whose duties and responsibilities included, among others, organizing gasoline and service station employees and obtaining recognition of Local 705 as a bargaining representative by gasoline and service station dealers.

5. At the time and place aforesaid,

Robert Jacobs, defendant herein, duly appearing as a witness before this grand jury and being under oath, made false material declarations with respect to the aforesaid material matter as follows:

* * * * *

(P. 54) Q. Now, I asked you before I believe were you aware that there were certain allegations made in hearing before the National Labor Relations Board, you are aware of that, are you not?

A. Yes.

* * * * *

(P. 59) I was accused of in that transcript of entering a gas station with two guns and two contracts and slapping them down on the table and saying which is it going to be, you know, the guns or the contract.

I submit to you that I never threatened a service station operator in my life. I never extorted a contract at gun point and if I did, I ought to be in jail.

I ask that you bring these two witnesses that made those statements here, put them on the lie box and I'll willingly go on the lie box. I'm not taking the fifth amendment, I'm telling you the truth. I hope you believe me.

Q. Mr. Jacobs, as long as you brought that up, Mr. Rex Jones, testified before the N. L. R. B. under oath that in December of '67, that you entered his gas station patting a blue-nose revolver, which you carried in a belt holster. You displayed to him in the presence of his son, and said ,"Everybody on (P. 60) the street is in the Union and you are going to be whether you like it or not."

Did you say that to Mr. Jones?

A. Mr. Jones, is a psychopathic liar and I wish he was here so I could tell it to him in his face and again,

I invite you to put Mr. Jones on the lie box and me on the lie box.

Q. Did you say that to Mr. Jones?

A. No, I did not say that to Mr. Jones. No, I do not organize at gun point.

(P. 61) Q. Mr. Jacobs, did you enter the gas station of Mr. Jones with a gun in your belt?

A. No.

Q. Now—

A. I kept a gun in my car and I told you that. I always keep it—there's a gun in my car parked right down the street right now and if that's a violation of the law, I'm not aware of it.

Q. All right. Mr. Jacobs, Mr. Robert O. Marshall testified before the N. L. R. B. that you entered his gas station on South Stoney Island and (P. 62) placed two Union contracts on the table, opened up your coat, displayed two guns—

A. Two guns this time?

Q. Right. "What's it going to be?" Did that happen?

A. No, that did not happen. Both Bob Marshall and Rex Jones have been under Union contract for at least five or six contracts, which stand for at least 15 or 18 years. So, you know, everybody can organize them, but Bobby Jacobs had to organize them at gun point.

I submit to you it's a lot of poppycock and again I ask that you bring them forward and ask them to submit to a lie test and I'll take one right now.

Q. Mr. Jacobs, did you have a gun in your possession at that time?

A. I don't remember. How do I remember. Generally I have a gun in the trunk of my car or under the seat.

Q. Did you have a gun under your belt?

A. I never carry a gun into the gas station. I have no reason to carry a gun. . .

(P. 63) Q. You keep it in the trunk of your car?

A. I keep it under the seat of my car. I don't think they are going to give me a chance to go back and open my trunk and say time out fellas.

I kept a gun in my car during the time I worked for the Union because I carried large amounts of money. It was

not unusual for me to hit 50 or 60 gas stations in a day and collect the dues on one, two, five or six members. And a large amount of money, and again about a third of it was in cash and sometimes you got your pockets like this (indicating), I use to throw it in the trunk, throw it in the glove compartment and all over.

Q. When you were working for Local 705, did you ever carry a gun to a gas station?

A. No, sir.

* * * * *

(P. 68) Q. Mr. Jacobs, everything you say before this body is under oath.

A. Well, I want to remind you that I know that I'm under oath, so I ain't got no chance to weasle out.

Let me tell you something, you know, these good people here may think that I'm some kind of a rough neck or something because I don't talk so polite, but I'm a hard working guy. I been pumping gas since I was seven years of age. I'm 47 years old now. Outside of a stint in the United States Army in World War II, I have earned every penny that was given to me and I never stole a dollar in my life. I never extorted a dollar, and I never threatened anybody with no pistols to sign no contracts or nothing else like that and that's why I don't want to take the fifth amendment because I don't want anybody to think I did, because I didn't.

6. The aforesaid declarations of Robert Jacobs were false and known by him to be false when made, in that he had entered the service stations of Rex Jones, Robert Marshall and others in possession of a gun;

In violation of Title 18, United States Code, Section 1623.

A TRUE BILL:

(Illegible)
Foreman

(Illegible)
United States Attorney

SJK:sh

APPENDIX E.

18 U. S. C. § 1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * * *

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

18 U. S. C. § 1623. FALSE DECLARATIONS BEFORE GRAND JURY OR COURT.

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .

20 U. S. C. § 158(b).

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title. *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

* * * * *

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

Supreme Court, U. S.
FILED
MAY 3 1977
MICHAEL RODAK, JR., CLERK

No. 76-1215

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
WILLIAM G. OTIS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1215

ROBERT JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 543 F. 2d 18. The opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1976. A petition for rehearing with a suggestion of rehearing *en banc* was denied on February 2, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person charged with perjury before a grand jury may defend by arguing that truthful answers would not have shown that a substantive crime had been committed.

STATEMENT

On September 19, 1973, petitioner appeared voluntarily before a federal grand jury in the Northern District of Illinois. The grand jury was investigating possible violations of the Hobbs Act (18 U.S.C. 1951) and "other federal criminal statutes" (Pet. App. D1). In the course of its inquiry, the grand jury sought information concerning extortion of service station dealers by organizers for Local No. 705 of the Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union (the "Union") (Pet. App. D1).

Petitioner is a Union organizer. An Assistant United States Attorney told petitioner that he was a possible subject of the investigation and that he "could be named as a defendant in an indictment arising out of this investigation." He also told petitioner that giving false answers is a crime. Petitioner stated that he understood the warnings (G.J. Tr. 3-4).[1]

Counsel asked petitioner whether, in December 1967, he had entered Rex Jones's gas station armed with a revolver and told Jones: "Everybody on the street is in the Union and you are going to be whether you like it or not." Petitioner denied that such an incident had occurred (Pet. App. D2-D3). The government attorney also asked petitioner whether he had entered a gas station belonging to Robert Marshall, placed two Union contracts on the table, displayed two guns in his belt, and said: "What's it going to be?" Petitioner again denied that such an episode had taken place; he stated that he never carried a gun into a gas station (Pet. App. D3-D4).

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[1]Petitioner was also advised that he need not answer incriminating questions, that his answers could be used against him, and that he could consult with an attorney before answering any question (G.J. Tr. 4-6).

Petitioner was indicted for making false declarations to a grand jury, in violation of 18 U.S.C. 1623. The district court dismissed the indictment (Pet. App. A1-A3), holding that the allegedly false testimony was not material to any inquiry within the authority of the grand jury. The court reasoned that the allegedly extortionate methods used by petitioner were employed for a legitimate union objective (*i.e.*, to become the exclusive bargaining agent), and that, consequently, "no lawful indictment for Hobbs Act violations could have issued" (Pet. App. A3) in light of *United States* v. *Enmons*, 410 U.S. 396.

The court of appeals reversed (Pet. App. B1-B7). It held that the grand jury investigation was "broad enough to encompass conduct outside the pursuit of legitimate labor ends, [such as] * * * [e]xtortion of personal payoffs or other illegitimate benefits [which] would not be protected by *Enmons*" (Pet. App. B5). It concluded that "[t]he mere possibility that the grand jury would not find conduct indictable in light of *Enmons* would not deprive it of authority to investigate to see whether indictable offenses had been committed" (*ibid.*). Judge Hastings dissented, primarily for the reasons stated by the district court (Pet. App. B6-B7).

ARGUMENT

Petitioner contends that this case presents important issues concerning the meaning of the Hobbs Act. It does not. Petitioner's presentation rests upon a fundamental misconception of the grand jury's "wide latitude to inquire into violations of criminal law." *United States* v. *Calandra*, 414 U.S. 338, 343. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg* v. *Hayes*, 408 U.S. 665, 701-702. Indeed, the "Grand Jury * * * can investigate

merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Bisceglia*, 420 U.S. 141, 148, quoting from *United States* v. *Powell*, 379 U.S. 48, 57.

A grand jury is entitled to hunt for clues. It is entitled to ask questions that will show that a crime did *not* occur. This grand jury was investigating not only Hobbs Act offenses, but also crimes in violation of "other federal criminal statutes," as petitioner was admonished in the grand jury room (G.J. Tr. 3). Even if the questions concerning petitioner's alleged threats could not have illuminated conduct indictable under the Hobbs Act, they might have shed light on violations of other laws—concerning, for example, firearms or conspiracy. " 'When the grand jury is performing its investigatory function into a general problem area * * * society's interest is best served by a thorough and intensive investigation' " (*Branzburg* v. *Hayes*, *supra*, 408 U.S. at 701, quoting from *Wood* v. *Georgia*, 370 U.S. 375, 392).

A question is "material" as long as it will further the grand jury's investigation, and the questions asked of petitioner were material under this standard. Truthful answers might have absolved petitioner (and others) of criminal responsibility, thus helping the grand jury to perform its historic function of shielding persons from unwarranted charges. Or, perhaps, truthful answers might have led to other questions and answers that would have disclosed that petitioner or others extorted money for personal rather than Union uses. It is hard to say where the inquiries might have led; petitioner forestalled those inquiries by denying the grand jury the one thing to which it was indisputably entitled—the truth. Cf. *United States* v. *Mandujano*, 425 U.S. 564, 577. Petitioner nipped the grand jury's investigation in the bud, and he is in no position to benefit by the argument that, if he had told the truth, the grand jury could not have returned a valid indictment charging him

with violations of the Hobbs Act. As the court of appeals explained (Pet. App. B5), "[t]he mere possibility that the grand jury would not find conduct indictable in the light of *Enmons* would not deprive it of authority to investigate to see whether indictable offenses had been committed."

Beyond this, petitioner misreads *Enmons*. That case does not exempt from Hobbs Act prosecution all threats by a union official against an employer. Where, as in this case, the Union does not represent the employees[2] and there is no collective-bargaining dispute to which any Union member is a party, the Hobbs Act prohibits extortion. Threats of the kind at issue here are quite unlike those at issue in *Enmons*, where a union threatened violence to induce an employer to meet its wage demands in the context of an established collective bargaining relationship (410 U.S. at 399). A demand that employees bargain through the Union and pay dues to it regardless of their wishes simply cannot be characterized as a "legitimate collective-bargaining demand" (*ibid.*); it was neither legitimate nor undertaken to achive a goal sought in the collective bargaining process.[3] The Hobbs Act prohibits extortion for such an end.[4]

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[2]Petitioner apparently concedes that the Union did not represent the employees at the Jones and Marshall dealerships (Pet. 10-12), although one employee at each station eventually became a Union member (Pet. 11-12 n. 2).

[3]Petitioner's "organizing" activities were the subject of an investigation by the National Labor Relations Board. An administrative law judge found that the Union employed threats and "strong-arm" tactics to become the exclusive representative of employees at the Jones and Marshall service stations, even though the employees at Jones's business refused to join. The judge concluded that these activities constituted "sheer racketeering" (Pet. 5).

[4]Petitioner extravagantly characterizes the court of appeals' holding as one that "*all* violence occurring during the process of organizing violates the Hobbs Act" (Pet. 11). This and other characterizations

Even if petitioner's alleged threats could be characterized as furthering a "legitimate collective-bargaining demand," however, the questions asked by the grand jury here would still have been within its authority. A labor tactic not otherwise illegal under the Hobbs Act may become so if associated with an illegitimate objective, such as a payoff for the union representative. *United States* v. *Quinn*, 514 F. 2d 1250 (C.A. 5), certiorari denied, 424 U.S. 955. There was at least a possibility that petitioner was seeking payoffs, using threats to create a climate of intimidation in which the victims would pay him money to prevent being harmed or harassed. Such activities are Hobbs Act offenses under the express language of *Enmons, supra*, 410 U.S. at 400. Petitioner's alleged perjury may have prevented the grand jury from investigating this possibility, which the grand jury was entitled to explore by inquiring into the methods used in petitioner's "negotiations."[5]

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overlook the fact that this is a perjury case, not a substantive Hobbs Act case. Any language of the court of appeals beyond what was necessary to conclude that petitioner's statements were material to a legitimate investigation is *dicta*. In any event, we cannot find within the court's opinion the views on the Hobbs Act petitioner attributes to it.

[5]In any event, petitioner's arguments are premature. The court of appeals' reinstatement of the indictment puts petitioner in the position he would have occupied if the district court had denied his motion to dismiss. Such a ruling would not have been subject to interlocutory appeal (*Parr* v. *United States*, 351 U.S. 513). Petitioner may be acquitted at trial, in which case his claim will be moot. If, on the other hand, petitioner is convicted and the conviction is affirmed, he will then be able to present this claim, as well as any others that may arise during the trial, to this Court in a petition for certiorari to review the final judgment. *American Foreign S.S. Co.* v. *Matise*, 423 U.S. 150, 155; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1977.

Supreme Court, U. S.
FILED
APR 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1215

UNITED STATES OF AMERICA,
Respondent,

vs.

ROBERT JACOBS,
Petitioner.

BRIEF AMICUS CURIAE OF JOINT COUNCIL 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The parties having given their consent, this brief is filed pursuant to Rule 42.1.

INTEREST OF THE AMICUS CURIAE.

Joint Council 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter JC 25) is a central labor body representing 155,000 members constituted in 29 separate local unions all located within the Seventh Judicial Circuit. It has a vital interest in the Seventh Circuit's sweeping extension of the Hobbs Act, 18 U. S. C. § 1951, since the touchstone for a valid Hobbs Act indictment under *Jacobs* is not an extortionate object but the number of members which the union represents.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Conflicts With Enmons Because Regardless of the Number of Employees Represented by the Union the Threatened Use of Force to Achieve Recognition as Exclusive Bargaining Representative Is Not a Violation of the Hobbs Act.

The Seventh Circuit in *Jacobs* has extended the Hobbs Act to alleged threats of force by a union agent to obtain the lawful object of exclusive recognition if the union does not represent a majority of the threatened employer's employees. In examining the Hobbs Act the court used the wrong end of the microscope. It focused not on the object of the conduct but on the number of employees who support the union.

In an effort to distinguish *United States* v. *Enmons*, 410 U. S. 396 (1973), the court theorized:

> Presumably a demand for recognition, on behalf of a union authorized to represent the majority of employees albeit at gun point, cannot under *Enmons* violate the Hobbs Act. We think the same demand on behalf of a union which does not have authority to represent any of them could violate it.

This Court in *Enmons* made no such distinction. This Court's test is whether the goal of the union is legitimate, *viz.*, to obtain recognition and a collective bargaining agreement rather than to obtain personal payoffs.

If the court below is simply saying that personal payoffs violate the Hobbs Act, there is no reason for the comment that "the same demand on behalf of a union which does not have authority to represent any [employees] . . . *could* violate it." The court gives no clue as to either the circumstances which convert "could" to "will" or the basis for this judicial extension of the reach of the Hobbs Act.

In *Enmons*, this Court emphasized that " 'wrongful' " has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be wrongful because the alleged extortionist "has no lawful claim to that property" (410 U. S. at 400). Further amplifying this point, this Court explained: "where a union uses violence to achieve legitimate union objectives, such as higher wages in return for genuine services which the employer seeks . . . there has been no 'wrongful' taking of the employer's property; he has paid for the services he has bargained for . . ." (*Id.* at 400).

Jacobs was charged with attempting to force certain employers to sign a lawful union contract calling for, *inter alia*, recognition, payment of wages and fringe benefits. Jacobs' *object* was legitimate because it is not claimed he sought payoffs or that the employer would have paid for fictitious services.

Jacobs' object was the same as the union in *Enmons*, *i.e.*, to force the employer to sign the contract. In *Enmons*, the Court rejected the government's argument that the use of certain type of force could convert a lawful object to an unlawful one. If the degree of force cannot be the criterion, it follows that the number of employees which the union represents is an equally invalid standard. The legality of a defendant's object cannot depend on whether the union represents 51% of the employees, 30% of the employees, or no employees. In each circumstance, all that is sought is the lawful object of requiring the employer to sign a contract. Mister Justice Blackmun's advice in his concurring opinion in *Enmons* should indeed be heeded:

> The Government's posture, with its concession that certain strike violence (which it would downgrade to incidental) . . . although aimed at achieving a legitimate end, is not covered by the Act, necessarily means that the legislation would be enforced selectively or, at the least, would embroil all concerned with drawing the distinction between major and minor violence. That, for me, is neither an appealing prospect nor solid support for the position taken.
>
> *Id.* at 412.

If the court's opinion means that the finding of a violation depends on the number of employees which the union represents, all federal courts will be embroiled in a quagmire ill-suited for the federal criminal statutes. The NLRB has a most difficult time in determining a union's majority status, *viz.*, are the authorization cards valid; have the cards been revoked, or procured by misrepresentation? Putting aside authorization cards, how will the court determine the delicate question of the appropriate bargaining unit which has long troubled the NLRB? Are clerical employees to be considered part of the unit? Are truck drivers to be deemed a separate unit? What is the status of persons claimed to be supervisors? If the decision below is permitted to stand courts will have to conduct a representation hearing as part of a federal criminal trial.[1]

Our concern with the *Jacobs* distinction between majority and non majority support is comparable to Mister Justice Blackmun's concern between major and minor violence. We suggest that Mister Justice Blackmun's rationale in *Enmons* is equally applicable here:

> Even if the language and history of the Act was less clear than we have found them to be, the Act could not properly be expanded as the Government suggests—for two related reasons. First, this being a criminal statute it must be strictly construed, any ambiguity must be resolved in favor of lenity.
>
> Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an unprecedented excursion into the criminal jurisdiction of the State.
>
> *Id.* at 417.

1. In *NLRB* v. *Weingarten, Inc.*, 420 U. S. 251, 267 (1975), this Court re-emphasized that the Board has the "special function [of] applying the general provisions of the Act to the complexities of industrial life . . . and its special competence in this field is the justification for the deference accorded its determination." Lower courts too have steadily expressed deference for NLRB expertise in these areas, *e.g.* "Initially, the responsibility lies with the Board, and its determination, unless illogical or arbitrary ought not to be disturbed," *NLRB* v. *Thor Power Tool Co.*, 351 F. 2d 584 (7th Cir. 1965); "the Board must draw the line between protected and unprotected behavior," *NLRB* v. *Ben Pekin*, 452 F. 2d 205 (7th Cir. 1971).

II. The Circuit Court's Decision Could Hold Countless Employers and Unions Subject to the Hobbs Act Violations for Engaging in Unfair Labor Practices.

The National Labor Relations Act, as amended, demonstrates that Congress was concerned that unions be the true majority representatives of employees and that employers not assist unions in obtaining such status. It is not enough that a union demonstrate its majority status; the NLRA requires that such majority status be legally obtained otherwise the employer violates § 8(a)(2), 29 U. S. C. § 158(a)(2), and the union violates § 8(b)(1)(A), 29 U. S. C. § 158(b)(1)(A). *Garment Workers Union* v. *NLRB*, 366 U. S. 731.[2]

However, while regulating contracts with minority unions, Congress continued to recognize that peaceful picketing of an employer by a minority or non-representative union was a legitimate union object which is beyond any regulation for a reasonable period not to exceed 30 days, and remains beyond regulation if a representation petition is filed. 29 U. S. C. § 158 (b)(7)(C), Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 265-70 (1959), see also *NLRB* v. *Teamsters Local* 639, 632 U. S. 274.

2. Congress has given the NLRB authority in this area. The Board has long dealt with the problems of minority unions or majority unions which use force to obtain lawful objectives. In 1972, 328 unfair labor practice charges were filed alleging 8(a)(2) violations. *Thirty-Seventh Annual Report of the NLRB* at 225. While each charge obviously did not result in the issuance of a complaint, it is apparent that 8(a)(2) illegal assistance allegations are substantial. For remedial purposes, where the majority status of the union is tainted the union has no legal right to represent the employees and monies which were deducted from the employees wages through dues check-off are refunded.

While the proposition seemed well settled that so long as the object of conduct is legitimate violence does not convert it to a federal crime, *Enmons, supra; United States* v. *DeLaurentis,* 491 F. 2d 208 (2nd Cir. 1974); *United States* v. *Caldes,* 457 F. 2d 74 (9th Cir. 1972); *United States* v. *Bailes,* 120 F. Supp. 614 (S. D. W. Va. 1954), the effect of the decision in *Jacobs* is to convert an unfair labor practice, or a mistake as to the number of employees in, or what is, an appropriate bargaining unit, into a federal crime. Such a decision must not be permitted to stand.

CONCLUSION.

The use of force or threats of force in seeking to organize employees is not to be condoned. It was and is subject to state criminal jurisdiction and NLRB regulation. The organizing of employees, even if accompanied by violence, however, is a legitimate end. Where the end is legitimate the Hobbs Act has no place in the Congressional scheme. Federal criminal statutes are not to be used to satiate one's moral indignation over the choice of method where the end is conceded to be legitimate. This Court should grant certiorari.

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